Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1643

MARGARET E. BOSCO,

Petitioner,

vs.

ECKARDT C. BECK, Region II Administrator, U. S. ENVIRONMENTAL PROTECTION AGENCY; DOUGLAS COSTLE, as Administrator, U. S. ENVIRONMENTAL PROTECTION AGENCY; JERRY F. ENGLISH, as Commissioner, N. J. DEPARTMENT OF ENVIRONMENTAL PROTECTION; PEQUEST RIVER MUNICIPAL UTILITIES AUTHORITY (WARREN COUNTY) and TOWN OF BELVIDERE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT JERRY F. ENGLISH, COMMISSIONER, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION IN OPPOSITION

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Counter-Statement of Issues Presented

Should the Petition for Writ of Certiorari be granted where the District Court and the Court of Appeals both upheld the determination of the Environmental Protection Agency that no Environmental Impact Statement was necessary for the approval of a grant for sewerage collection and treatment facilities where the decisions below comport with existing federal law and raise no significant issues of law or fact?

Counter-Statement of the Case

This is an action brought by petitioner Margaret E. Bosco pursuant to the National Environmental Policy Act of 1969 (hereinafter "NEPA"), 42 U.S.C. §4321 *et seq.*, seeking injunctive relief restraining respondents from building sewerage collection and treatment facilities in and around Belvidere, New Jersey, without the preparation of a complete Environmental Impact Statement (hereinafter "EIS"). Petitioner contends that NEPA requires the filing of an EIS, 42 U.S.C. §4332(2)(c), because the construction of the sewerage facilities is a major federal action significantly affecting the quality of the human environment.

The Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.*, establishes the EPA grant program for the construction of publicly owned sewerage treatment works and forms the statutory basis for construction of the sewerage treatment plant and collection system at issue in this litigation. 33 U.S.C. §1291(1) and (2). This statute authorizes EPA to make grants to any state, municipality or intermunicipal or interstate agency for the planning, design and construction of wastewater treatment facilities

and collection systems and to provide up to 75% of the eligible costs of construction. The State of New Jersey, through the New Jersey Clean Waters Bond Act of 1976, has agreed to provide 8% of the funding for the present projects.

Current EPA regulations require an applicant for a wastewater treatment works construction grant to submit an environmental assessment with the facilities plan developed under a Step 1 grant. 40 C.F.R. §6.512(a). This environmental assessment must include a description of the environmental impacts of the project, a description of the steps taken to minimize any adverse environmental effects, an evaluation of feasible alternatives, a description of the existing and future environment without the project and documentation of these findings. 40 C.F.R. §6.512(a). The EPA then reviews this environmental assessment and determines whether significant environmental impacts are expected from the proposed action, whether feasible alternatives can be adopted or changes made in project design to eliminate adverse impacts and whether an EIS or a Negative Declaration is to be filed. 40 C.F.R. §6.204.

If EPA determines, as it did in the present action, that the proposed sewerage collection and treatment facilities will not have a significant impact upon the environment, it issues a Negative Declaration together with an Environmental Impact Appraisal. The Negative Declaration is a written announcement prepared after EPA's environmental review stating that the EPA has determined that an EIS is not required for the proposed project. 40 C.F.R. §6.102(e). The Environmental Impact Appraisal (hereinafter "EIA") is prepared concurrently with the Negative Declaration and briefly describes the proposed action and feasible alternatives, environmental impacts of the

project, unavoidable adverse impacts of the action, the relationship between the short-term uses of man's environment and the maintenance and enhancement of long-term productivity, steps to minimize harm to the environment, irreversible and irretrievable commitments of resources necessary to implement the action, comments and consultation to the project and reasons for concluding that the proposed action will not have a significant environmental impact. 40 C.F.R. §6.212(b)(2).

The Warren County-Pequest River Sewerage Authority submitted to the DEP in 1975 its proposed plan of study of the region's wastewater management options. The DEP approved and certified this planning application in April, 1975 and the EPA approved the Authority's application for a Step I grant for the preparation of the Facilities Plan in July, 1975.

The full Wastewater Facilities Plan for the Pequest River Drainage Basin was issued preliminarily to EPA, DEP, the Authority and to the general public for comment in May, 1976. This Plan provides a comprehensive discussion and analysis of engineering and environmental concerns relating to wastewater treatment in the Pequest River drainage basin area and it develops and evaluates possible alternatives to its proposals. The Facilities Plan concludes that two regional facilities—one in Oxford Township and the other in White Township and serving the Town of Belvidere directly adjacent to this facility —would provide the most environmentally sound and cost effective method of sewerage treatment.

A public hearing was held concerning the Facilities Plan in May, 1976 pursuant to EPA regulations for compliance with NEPA in the Title II Wastewater Treatment Works Construction Grants Program, 40 C.F.R. §6.500 *et seq.*, and a subsequent hearing concerning only the Belvidere

collection system was held in August, 1976. The only questions raised at the initial hearing concerned the claim that some of the public did not have adequate time in which to read the Facilities Plan; the Authority fully responded to written questions posed by interested persons subsequent to the second hearing.

The EPA issued its Negative Declaration and Environmental Impact Appraisal for the Belvidere treatment plant and collection system on September 8, 1978. It is this decision by the EPA which petitioner challenges; the Oxford project is not at issue in the present lawsuit.

No comments or objections were submitted to the EPA for the consideration within fifteen (15) day comment period provided upon the issuance of the Negative Declaration and therefore no further hearing was required. An additional public meeting, not required by law, was held by the EPA in February, 1979, subsequent to which the EPA upheld its determination of a Negative Declaration in a nineteen (19) page letter sent to all interested parties.

On June 12, 1979 petitioner filed a complaint in the United States District Court for the District of New Jersey challenging EPA's issuance of a Negative Declaration and on June 22, 1979 she filed a motion for preliminary injunction. On the return date of August 21, 1979 the Honorable Clarkson S. Fisher, U.S.D.J., with the consent of all parties, ordered the trial of this action on the merits to be advanced and consolidated with petitioner's injunction application. Judge Fisher's Order and Judgment in this matter was filed August 30, 1979 denying petitioner's application for injunctive relief and dismissing her complaint. In his opinion, filed simultaneously, Judge Fisher determined that petitioner had failed to demonstrate that EPA's decision to file a Negative

Declaration and an Environmental Impact Appraisal was either arbitrary and capricious or unreasonable (Pet. App. 35-72). The Third Circuit affirmed the decision of the District Court without opinion on January 18, 1980 (Pet. App. 34).

The Town of Belvidere commenced construction of the collection system portion of this project on October 15, 1979.

ARGUMENT

The Supreme Court should deny the petition for writ of certiorari because the District Court's decision that the determination of the Environmental Protection Agency to issue a Negative Declaration and Environmental Impact Appraisal was neither arbitrary and capricious nor unreasonable presents no undecided legal issues nor factual disputes not correctly decided below and because the particular facts contained in this record have no larger significance beyond this case.

This case presents no undecided legal issues nor any factual disputes which were not correctly and conclusively decided by the District Court and affirmed without opinion by the Third Circuit. Petitioner's assertions of error in the lower courts are plainly incorrect but, even assuming them to be true, the decision in this case turns solely upon the particular facts contained in this record and has virtually no greater importance beyond this case.

The initial Question Presented by the petitioner, whether the decision of the District Court is in error because it applies the "arbitrary and capricious" standard of review instead of a "reasonableness" test to its review of the EPA's decision to issue a Negative Declaration, is

not raised by the decision below. The District Court reviewed the determination of the EPA not to issue an EIS under the "arbitrary and capricious" standard (Pet. 53) but it also explicitly examined EPA's decision under the more rigorous "reasonableness" test as well (Pet. App. 67). While petitioner correctly asserts that there may be some difference among the United States Circuit Courts as to which of the foregoing standards of review is to be applied under NEPA in reviewing the activities of federal agencies, compare, e. g. *Minnesota Public Interest Research Group* v. *Butz,* 498 F. 2d 1314 (8th Cir. 1974) (en banc) and *Sierra Club* v. *Froehlke,* 534 F. 2d 1289 (9th Cir. 1976), the District Court's finding that the Environmental Impact Assessment issued by the EPA passes muster under both standards of review eliminates all ambiguity and potential question of law and necessarily removes this issue as a basis for granting the petition for certiorari.

The third and fourth Questions Presented by the petition for certiorari concern allegations of conflict of interest, undue pressure and political intervention associated with the sewerage treatment works. The record is totally devoid of any evidence beyond petitioner's unsubstantiated assertions at oral argument before the District Court that there is any conflict of interest whatsoever on the part of any individual which in any way affects the decision of the EPA to proceed with the funding and construction of this project. The District Court correctly found that petitioner's allegations were unsubstantiated by facts and, moreover, that they are irrelevant to the question presented to the Court (Pet. App. 67).

Petitioner's assertion as stated in her second Question Presented, that the District Court's determination to uphold

the EPA decision to issue an Environmental Impact Assessment is not supported by the evidence, finds no support in the record and is plainly insufficient to warrant the granting of this petition. The record in this case clearly reveals that EPA has closely examined the proposed sewerage collection and treatment facilities and has found that they will not result in significant environmental impacts. The EIA prepared by EPA and submitted with the Negative Declaration specifically determined that the installation of the sewerage system will not contravene either state or federal air quality standards, that noise levels due to actual operation of the system will not be significant and will be contained within the isolated area of the pumping station, that the construction of the pumping station will have minimum impacts upon the natural resources of the area and that the project will not impact upon any critical areas. The EIA discusses five alternatives to the present project before concluding that the present plans are most acceptable, it indicates that eleven separate steps to minimize the impact upon the environment will be taken during construction and its states that all affected areas will be restored to a condition at least comparable to what existed prior to construction. The record demonstrates that each of the five (5) environmental impacts alleged by petitioner in the District Court to be "significant" and thus to necessitate the filing of a full EIS, see 42 U.S.C. §4332(2)(c), including reduction in groundwater recharge, alignment of the collection system, disruption of the Pophandusing Brook and increased river turbulence at the treatment plant outfall, was found by the EPA and upheld by the District Court to be insignificant and in fact contradicted by the express findings of the Environmental Impact Assessment.

The one specific error of the District Court alleged in the petition for certiorari, that the District Court's conclusion that a single internal contradiction in the environmental impact assessment concerning the impact of odors produced by the proposed treatment plant is attributable to "sloppy draftsmanship" and not an error of fact (Pet. 21-22), is manifestly unsupported in the record. The District Court found on this issue that EPA had given "serious consideration" to the odor problem and that the use of certain devices would render this impact "insignificant" (Pet. App. 63).

Because the factual issues presented by the record were all decided correctly below and, in any event, have no importance beyond the present case, and because this case presents no undecided legal issues, there is no basis for the granting of the petition for writ of certiorari.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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